IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 21-12-2004

Coram:

The Honourable Mr. MARKANDEY KATJU, Chief Justice
and
The Honourable Mr. Justice N.V. BALASUBRAMANIAN

W.A. No.3133 of 2004 and
WAMP Nos. 5863,5864/2004 and
WVMP.Nos.7719,7720/2004

S. Selvarani :: Appellant

:versus:

1. The Commissioner
Karaikudi Municipality
Karaikudi 630 002

2. V. Asokan :: Respondents
R2 - Impleaded vide order of Court
dated 15.10.04 made in WAMP No.6894/04

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Appeal under Cl.15 of the Letters Patent against the order dated 9-8-2004 in W.P. No.14177 of 2004

For Appellant :: Mr. PL. Narayanan

For Respondents :: Mr. V.R. Shanmuganathan
(for R2)
Mr. P.S. Jayakumar(R1)

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JUDGMENT

(Delivered by the Honourable The Chief Justice)

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This writ appeal has been filed against the order dated 9-8-2004 passed by the learned single Judge, dismissing the writ petitions filed by the appellant herein.

2. The respondent-Municipality conducted a public auction on 19-3-2004 in respect of the right to collect the rent from the road-side vendors for the period 2004-05. In the said public auction, second respondent herein was the highest bidder, but due to the intervention of General Elections, the bid was not confirmed in his favour. The appellant, who was the licence-holder for the earlier period, viz. 2003-04, was allowed to continue till May 2004

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on payment of proportionate lease amount. The appellant, after the auction process was over on 19-3-2004, wrote a letter to the Municipality expressing her willingness to offer Rs.6,000/- more than the amount offered by the second respondent. When the respondent-Municipality intended to hold a fresh auction, the second respondent herein, who was the highest bidder in the auction held on 19-3-2004, filed a writ petition (W.P. No.13434 of 2004) praying for a Writ of Mandamus directing the respondent-Municipality to confirm the auction in his favour by accepting his bid. The appellant also filed two writ petitions against the respondent-Municipality, viz. (W.P. No.2379 of 2004 and W.P. No.14177 of 2004) directing the respondent-Municipality to renew the lease in her favour on the premise that after the conclusion of the auction proceedings on 19-3-2004, she expressed her willingness to offer Rs.6,000/- more than the bid offered by the second respondent herein. The learned single Judge, by a common order, dismissed the writ petitions filed by the appellant herein. It is against this order, that the present appeal has been filed.

3. Heard the learned counsel for the appellant and the learned counsel for the respondent. We have carefully perused the impugned order.

4. It is an admitted fact that the right to collect rent from the road-side vendors was put to public auction by the respondent-Municipality after notifying the same in well-known dailies having wide circulation in the locality and in the public auction, the second respondent was the highest bidder but, his bid was not confirmed and the contract was not awarded in his favour.

5. Learned counsel for the appellant contends that after the auction was over on 19-3-2004, on the very day itself, the appellant, by private negotiation with the Municipality, expressed her willingness to offer Rs.6,000/- more than the bid offered by the second respondent and, therefore, the contract should be awarded in her favour.

6. The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public-auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality, with all relevant details such as date, time and place of auction, subject-matter of auction, estimated cost, Earnest Money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximise economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. However, in rare and exceptional cases, for instance during natural calamities and emergencies declared by the Government; where the procurement is available from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on

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several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed and such contracts may be awarded through 'private negotiations'. (See Ram and Shyam Company v. State of Haryana and others AIR 1985 SC 1147).

7. In Haji T.M.Hassan v.Kerala Financial Corpn. (AIR 1988 SC 157), the Supreme Court observed:-

> "It is needless to state that the Government or public authorities should make all attempts to obtain the best available price while disposing of public properties. They should not generally enter into private arrangements for the purpose. These principles may be taken as well established by the following decisions of this Court: (i) K.N.Guruswamy v. State of Mysore, (1955) 1 SCR 205 at p.312: AIR 1954 SC 592 at p.595), (ii) Mohinder Singh Gill v. Chief Election Commr., New Delhi, (1978) 2 SCR 272 : (AIR 1978 SC 851), (iii) R.D.Shetty v. International Airport Authority of India, (1979) 3 SCR 1014: (AIR 1979 SC 1628), (iv) Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir, (1980) 3 SCR 1338 : (AIR 1980 SC 1992), (v) Fertilizer Corpn. Kamgar Union v. Unkion of India, AIR 1981 SC 344, (vi) Ram and Shyam Company v. State of Harayana, 1985 Supp SCR 541 : (AIR 1985 SC 1147) and (vii) Sachidanand Pandey v. State of W.B., AIR 1987 SC 1109.
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> In R.D.Shetty v. International Airport Authority of India, (1979) 3 SCR 1014 at p.1041 : (AIR 1979 SC 1628 at p.1642), Bhagwati, J. speaking for the Court observed:
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> " Now, obviously where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government which we have discussed above must apply equally where such corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into relationship with any person it likes as its sweetwill, but its action must be in conformity with some principle which meets the test of reason and relevance.
>
> This rule also flows directly from the doctrine of equality embodied in Art.14. It is now well settled as a result of decisions of this Court in E.P.Royappa v. State of Tamil Nadu (AIR 1974 SC 555) and Maneka Gandhi v. Union of India (AIR 1978 SC 597) that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle, which is non-discriminatory; it must not be guided by any extraneous or irrelevant considerations, because

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that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Art.14 and it must "characterize every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory".

In Kasturi Lal Lakshmi Reddy v. State of J & K (1980) 3 SCR 1338 at p.1355: (AIR 1980 SC 1992 at p.1999), Bhagwati, J. again speaking for the Court reiterated what he said earlier in R.D.Shetty's case. The learned Judge went on to state:

"Every action taken by the Government must be in public interest. The Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if fails to satisfy either test, it would be unconstitutional and invalid."

The learned Judge continued (at p.1357 of SCR) : (at p.2001 of AIR):

"But one basic principle which must guide the Court in arriving at its determination on this question is that there is always a presumption that the Governmental action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not informed with public interest. This burden is a heavy one and it has to be discharged to the satisfaction of the Court by proper and adequate material. The Court cannot lightly assume that the action taken by the Government is unreasonable or without public interest because as we said above, there are a large number of policy considerations which must necessarily weigh with the Government in taking action, and therefore the Court would not strike down governmental action as invalid on this ground, unless it is clearly satisfied that the action is unreasonable or not in public interest. But where it is so satisfied it would be the plainest duty of the Court under the Constitution to invalidate the governmental action. This is one of the most important functions of the Court and also one of the most essential for preservation of the rule of law."

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In Fertilizer Corporation case, AIR 1981 SC 344 at p.350 this Court speaking through Chandrachud, C.J., observed:
"We want to make it clear that we do not doubt the bona fides of the authorities, but as far as possible, sales of public property, when the intention is to get the best price, ought to take place publicly. The vendors are not necessarily bound to accept the highest or any other offer, but the public at least get the satisfaction that the Government has put all its cards on the table. In the instant case, the officers who were concerned with the sale have inevitably, though unjustifiably attracted the criticism that during the course of negotiations the original bid was reduced without a justifying cause. We had willy-nilly to spend quite some valuable time in satisfying ourselves that the reduction in the price was a necessary and fair consequence of the reduction in the quantity of the goods later offered for sale on Mar.31, 1980. One cannot exclude the possibility that a better price might have been realized in a fresh public auction but such possibilities cannot vitiate the sale or justify the allegations of mala fides."

In Sachidanand Pandey v. State of West Bengal, AIR 1987 SC 1109 at p.1133, O.Chinnappa Reddy, J after considering almost all the decisions of the Court on the subject summarized the propositions in the following terms:
"On a consideration of the relevant cases cited at the bar the following propositions may be taken as well established: State owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest when it is considered necessary to dispose of a property is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism"

"The Public property owned by the State or by an instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the

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State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be above board. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favoritism or nepotism. Ordinarily, these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the Court repeatedly stated and reiterated that the State owned properties are required to be disposed of publicly. But that is not the only rule. As O.Chinnappa Reddy, J. observed "that though that is the ordinary rule, it is not an invariable rule." There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience".

8. In Committee of Management of Panchaiyappa's Trust v. Official Trustee of Madras, (1994) 1 SCC 475), the Supreme Court observed:-

" In K.N.Guruswamy v. State of Mysore (AIR 1954 SC 592), the Court was dealing with the sale of a liquor contract. It was observed that matters of "consequence to the State revenue cannot be dealt with arbitrarily and in the secrecy of an office". The Court has emphasized the need for publicity so that people at large have notice. It was held that " the furtive method adopted of settling a matter of this moment behind the backs of those interested and anxious to compete is unjustified"
"In Fertilizer Corporation Kamgar Union (Regd.) v. Union of India, (1981) 1 SCC 568, it has been observed (per Chandrachud, C.J.): (vide p.579, para 21)
"We want to make it clear that we do not doubt the bona fides of the authorities, but as far as possible, sales of public property, when the intention is to get the best price, ought to take place publicily. The vendors are not necessarily bound to accept the highest or any other offer, but the public at least gets the satisfaction that the Government has put all the cards on the table."

Relying on the said observations the Court in State of U.P v. Shiv Charan Sharma, 1981 Supp SCC 85, has held that, "public auction with open participation and a reserved price guarantees public interest being fully subserved"
In Ram & Shyam Co. v. State of Harayana, (1985) 3 SCC 267, it has been laid down: (vide p.277, para 12)

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> " On the other hand, disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the welfare State may be able to expand its beneficient activities by the availability of larger funds. … But where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy. An owner of private property need not auction it nor is he bound to dispose it of at a current market price. Factors such as personal attachment, or affinity, kinship, empathy, religious sentiment or limiting the choice to whom he may be willing to sell, may permit him to sell the property at a song and without demur. A welfare State as the owner of the public property has no such freedom while disposing of the public property"

9. Thus, the law is very clear that ordinarily all contracts by the Government or by an instrumentality of the State should be granted only by public auction or by inviting tenders, after advertising the same in well known newspapers having wide circulation, so that all eligible persons will have opportunity to bid in the same.

10. In the present case, the public-auction was notified in the local dailies having wide circulation in the locality and on the notified date and time, the auction was held and the second respondent herein was the highest bidder, but the auction was not confirmed in his favour due to the intervention of the General Elections. It is pertinent to note that the public-auction held on 19-3-2004 was not cancelled by the respondent-Municipality in the manner known to law. In such circumstances, we are of the opinion the appellant cannot claim that the contract should be awarded in her favour on the ground that she was ready to offer Rs.6,000/- more than the offer made by the second respondent. That apart, as per the auction conditions, if any bidder intends to offer more amount after the auction is confirmed, he will have to deposit the entire amount within twenty-four hours after the confirmation and thereafter seek for re-auction or confirmation of the auction in his favour, which the appellant has not done. She has merely sent a letter expressing her willingness to offer more than the second respondent. Therefore, we are of the opinion that the appellant cannot claim that the contract should be awarded in her favour.

11. Learned counsel for the appellant has relied on the decision of the Supreme Court in AIR INDIA LTD. v. COCHIN INTERNATIONAL AIRPORT LTD. AND OTHERS (2000 [2] SCC 617. We have perused the judgment carefully but we find that the said decision does not in any way depart from the law laid down in the above decisions of the Supreme Court, cited supra. This decision is, therefore, of no assistance to the appellant.

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12. Learned counsel then drew our attention to the provisions of Sec.10(3) of the Tamil Nadu Transparency in Tenders Act, 1998. In this connection, we would like to observe that no statute can prevail over the Constitution of India. According to the theory of jurisprudence of the eminent jurist Kelsen (the Pure Theory of Law), in every country there is a hierarchy of laws and the general principle is that if there is conflict between two laws – one in the higher layer of the hierarchy and the other in the lower rung – then the law in the higher layer will prevail. In our country, the hierarchy of laws is as follows:-

1.Constitution of India;

2.Statutory Laws – made either by Parliament or by the State Legislatures;

3.Delegated Legislation, which may be in the form of Rules or Regulations made under a statute etc.,

4.Executive instructions or Administrative Orders, viz. Government Orders, etc.

The Tamil Nadu Transparency in Tenders Act, 1998 being a State legislation falls under category (2) above and therefore the provisions of Sec.10(3) of the said Act cannot override or prevail over the provisions of Art.14 of the Constitution, which is in the highest layer in the hierarchy mentioned above. Hence, the provisions of Sec.10(3) of the said Act can only be interpreted in the manner in which we have mentioned above, viz. that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public-auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well-known dailies having wide circulation in the locality so that every eligible persons may bid in the auction. This alone will ensure the compliance of Art.14 of the Constitution. It is only in rare and exceptional cases, as mentioned above, that this rule may be departed and contracts may be awarded through private negotiations.

13. Apart from what is stated above, we are of the opinion that The Tamil Nadu Transparency in Tenders Act, 1998, may not be applicable to the facts of the present case, because the word "Procurement" in the aforesaid Act has been defined in Section 2(d) as follows:-

> " 'Procurement' means acquisition by any means by purchase of goods or services and also of construction."

We are at a loss to understand as to how the right to collect rent from the road-side vendors can be said to be a 'procurement' as defined in aforesaid Act. The said right is neither purchase of goods nor of services.

14. Even at the cost of repetition, we reiterate that the award of Government contracts through public auction/public tender is the rule and award of such contracts through 'private negotiations', except under certain contingencies mentioned above, must be frowned upon as it will give rise to speculations in the minds of the

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general public of some surreptitious, illegal or corrupt practices in collusion with the authorities concerned. Now a days, the Government contracts or contracts awarded by instrumentalities of the State are often worth crores and crores of rupees and unless there is transparency in awarding of such contracts, there is bound to be great dis-satisfaction and speculation in the minds of the general public of some underhand dealing. This would also be violative of Article 14 of the Constitution.

15. We then come to the question: whether a mandamus can be issued by this Court directing that the highest bid of the second respondent/V.Ashokan be accepted and confirmed by the first respondent?

16. The Constitution Bench of the Supreme Court in Triloghan Mishra v. State of Orissa, 1971 (3) SCC 153 (vide paragraph-14), observed:

> " With regard to the grievance that in some cases the bids of persons making the highest tenders were not accepted, the facts are that persons who had made lower bids were asked to raise their bids to the highest offered before the same were accepted. Thus there was no loss to Government and merely because the Government preferred one tenderer to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, the Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an overall consideration to be preferred to the higher tenderer"

17. In Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd, (1997) 1 SCC 738, the Supreme Court observed (vide paragraph-10) that in the matter of tender, the lowest bidder cannot claim enforceable right to get the contract.

18. Similarly, in Food Corpn. of India v. Kamdhenu Cattle Feed Industries (AIR 1993 SC 1601), the Supreme Court observed that the highest tenderer can claim no right to have his tender accepted, although this power to reject the highest tender should not be exercised arbitrarily.

19. In the circumstances, we cannot issue a mandamus to the first respondent to accept the bid of second respondent/V.Ashokan, even though he was the highest bidder. All that we can direct is that the bid of the highest bidder should not be rejected arbitrarily, but for some good reason.

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20. With these observations, this appeal is disposed off. No costs. Consequently, connected W.A.M.P.Nos.5863 and 5864 and W.V.M.P.Nos. 7719 and 7720 of 2004 are closed.

Jai/pv

Sd/
Asst.Registrar

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Sub Asst.Registrar

1. The Commissioner
   Karaikudi Municipality
   Karaikudi 630 002
   Sivagangai Dt.,

+ 1 cc to Mr.P.S.Jayakumar, Advocate SR No. 56393

+ 1 cc to Mr.P.L.Narayanan, Advocate SR No.56831

+ 1 cc to Mr.V.R.Shanmuganathan, Advocate SR No. 57057

W.A. No.3133 of 2004

GV(CO)
SR/6.1.2005

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